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Supreme Court of the United States

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OCTOBER TERM, A. D. 1906.

JACOB NEWMAN ET AL.,
Plaintiffs in Error,

vs.

HARRY B. GATES,
Defendant in Error.

No. 137.

Error to the Supreme Court of Indiana.

MEMORANDUM FOR PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

S. S. GREGORY,
Counsel for Plaintiffs in Error.

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Memorandum for Plaintiffs in Error in Opposition to Motion to Dismiss or Affirm.

The learned counsel for the defendant in error have noticed a motion to dismiss or affirm for Monday, the 3rd day of December.

The record in this case was filed October 23, 1905.

It is quite apparent that, in the ordinary course the case will be called for argument either during the week beginning December 3rd or the week following. I venture to submit that this court ought not to entertain the motion thus made at this late day; a motion which does not seem to be calculated to expedite the final decision of the cause and which has been thus delayed for appreciably more than a year since the filing of the record.

The only effect of taking this motion now and disposing of

the case upon it, would be to deprive the parties of the opportunity for oral argument; and that too in a case of such a character that, while not without its difficulties on the jurisdictional question, is so obviously destitute of merit, so far as the contention of the defendant is concerned, that, if this court entertains jurisdiction, it would seem that reversal with a direction to enter judgment in favor of the plaintiffs must be inevitable.

My learned associate, Mr. Martindale of Indianapolis, has filed an exhaustive brief dealing fully with the jurisdictional question raised and with the merits of the case. The two questions are so inextricably involved together that it is quite impossible to dispose of either without some consideration of both. I had supposed that under such circumstances, it was almost a matter of course for the court to reserve the motion to dismiss until the argument of the cause, even where such motion is seasonably interposed, except in cases where this court was so obviously without jurisdiction that the question did not admit of fair debate.

In view of this situation, it is not my purpose to attempt any discussion of the ingenious and specious arguments submitted by the learned counsel in support of their motion. The practical result of their position is, that a judgment rendered by a court of competent jurisdiction in Illinois, where both parties have appeared and the matter has been contested, is entitled to no faith and credit under the Constitution of the United States in the courts of the adjoining State of Indiana, and that matters thus litigated in one state can be re-opened and entirely set at large when the judgment is sued over in another state.

I am aware that this is sought to be justified upon various

grounds, but principally upon the ground that the Supreme Court of Indiana in disposing of this case held that the statutory procedure necessary to be followed in prosecuting an appeal where judgment had been rendered on a claim against the appellants had not been pursued. But before this question can be reached it must be determined whether or not any such claim exists. I do not intend by this statement; that this is necessarily true if a *bona fide* or plausible claim not involved in the federal question presented be asserted; and that this court, in a case of that character, would be entitled to hear the federal question involved. But an examination of this record will show that this claim is one so destitute of merit and even of plausibility, that it can furnish no pretext for such an evasion of the real and federal question presented. Such was the opinion of the intermediate court of appellate jurisdiction in Indiana, which reversed the judgment against plaintiffs in error on the merits and because the evidence adduced by the defendant under his spurious counter-claim did not even tend, as a matter of law, to establish any claim. This court can do no less than apply to such frivolous, sham and audacious efforts to defeat rights secured by the Constitution of the United States and which may well be regarded as making a case inherently federal in its character, the same rule which has been so often invoked and recognized by this court when an appeal is made to its jurisdiction to revise the judgments of the tribunals of the States upon the ground that they have disregarded some federal right, privilege or immunity.

It is not the fact that a party makes a claim, but that it has some plausibility and some reasonable foundation, that entitles it to be regarded by the courts.

It is the recognized law of England that the courts will go so far as to dismiss a sham suit in advance of any hearing on the merits; a jurisdiction to be sparingly exercised but existing nevertheless.

The rule that this court has adopted in the class of cases to which I refer is well stated by Mr. Justice White in the recent case of *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 311. He there said:

"Stated in another form, the doctrine thus declared is that although in considering a motion to dismiss it be found that a question adequate, abstractly considered, to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no real room for real controversy, the motion to dismiss will prevail."

He distinctly states, however, that this does not apply to cases where the subject-matter of the controversy is *per se* and inherently federal. I divert the discussion to say that that language might not inaptly be applied to the subject-matter of this controversy; for here the plaintiffs asserted a right referable to the Federal Constitution of such a character that, as I understand the law, had the amount involved been sufficient, it might have been in itself the basis for an appeal to the original jurisdiction of a Circuit Court of the United States.

In a subsequent case Mr. Justice Brewer, speaking for the court and quoting from former decisions, said:

"A real and not fictitious federal question is essential to the jurisdiction of this court over the judgments of state courts. (Citing cases.) In the latter case it was said that the bare averment of the federal question is not in all cases sufficient. It must not

be wholly without foundation. There must be at least color of ground for such averment; otherwise, a federal question might be set up in almost any case and the jurisdiction of this court invoked simply for the purpose of delay." *Sawyer* v. *Piper*, 189 U. S. 154–157.

I venture to suggest, without argument, another view. The case made by the defendant on motion to dismiss is not merely the case that would arise had the plaintiffs in error omitted to observe, in taking their appeal from the judgment of the trial court, something required by the local law or practice of Indiana, of such character that the appellate tribunals of that state wholly failed to acquire jurisdiction to look into the merits of the case; and then, after a ruling by the Supreme Court of the state to that effect, the case came here.

There is an element present and wholly omitted from this statement, which is controlling. The particular defect, in the steps taken by the plaintiffs to perfect their appeal, is held by the Supreme Court of Indiana to be, that they failed to make the personal representatives of their partner, who died after judgment in this case, parties on the appeal, this being required by the statutes of that state where surviving partners prosecute an appeal in respect of a claim against themselves and a partner thus dying.

But the plaintiffs in this case contend, as matter of law, as indeed the Appellate Court which examined the merits of the case held, that, on the whole case, the judgment sued on sweeps away every vestige of defendants' claim and is a complete bar and adjudication in respect of every matter which the evidence on the trial below tended to prove as a basis for such claim. The question thus raised is one ultimately for this court; and the de-

cision of that question by this tribunal cannot be foreclosed by the courts of the state, when, under the guise of deciding a question of local law or practice, they hold that because such a judgment is not entitled, under the organic law of the nation, to such conclusive effect, therefore some requirement of local practice on appeal must be met by parties bringing a case here to review their determination; and that by the failure to observe this requirement, neither the courts of the state nor this court can reexamine the federal question involved. *Rogers* v. *Alabama*, 192 U. S. 226.

The effect of the judgment sued on in the courts of Indiana is ultimately, under the Federal Constitution, in so far as it is matter of law, a question for this court. The courts of Indiana are competent to decide it, but their decision is not final, nor can they make it so by giving to the judgment in question a limited recognition, instead of full faith and credit; and then declare that, because its effect is thus limited, the rights of the parties, either in respect of the merits or of procedure, must be varied accordingly.

In matters of federal cognizance, state lines are vanishing lines; and the jurisprudence of the nation will not be completely rounded out nor its inherent and sovereign powers fully recognized and established until, in respect of all such matters, these lines have entirely disappeared.

Much has been said about the law of Illinois in this case. The position of plaintiffs rests upon no theory that the law of Illinois is other than the common law in this regard. It is certainly a conservative application of the doctrine of *res adjudicata*, as it obtains under the common law of this country, to say that

matters tried out and adjudicated in one case are not open to re-examination, in a suit at law, brought on a judgment thus recovered. That is sufficient for the purposes of the question before the court; and in the courts of Indiana, without proof, that would be presumed to be the law of Illinois.

The plaintiffs asserted an important right arising under the national Constitution. A decision upon it was evaded at the suggestion, by the defendant, of a sham and frivolous claim wholly wanting in merit and lacking even in plausibility. If it be that this court must recognize such disparagement of constitutional right, owing to the limitations upon its powers found in its organic law, that ought not to be done except upon the fullest discussion and the most careful consideration.

I respectfully suggest that the motion to dismiss or affirm should be held until the argument of this cause.

Respectfully submitted,

S. S. GREGORY,

Counsel for plaintiffs in error.

December, 1906.